



FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

APR 29 2009

Lane Hudson

Washington, D.C. 20009

RE: MUR 5942

Dear Mr. Hudson:

On April 2, 2009, the Federal Election Commission reviewed the allegations in your complaint dated September 24, 2007, and found that on the basis of the information provided in your complaint, and information provided by the Respondents, there is no reason to believe the New York Times Company or Rudy Giuliani Presidential Committee and John Gross, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a). Accordingly, on April 2, 2009, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analyses, which more fully explain the Commission's findings, are enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

A handwritten signature in cursive script that reads "Mark Allen".

Mark Allen
Assistant General Counsel

Enclosures
Factual and Legal Analyses

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **MUR 5942**

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7 **Respondent: The New York Times Company**

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9 **I. INTRODUCTION**

10 The complaint in this matter by Lane Hudson alleges that The New York Times Company
11 ("The Times") made a corporate contribution to the Rudy Giuliani Presidential Committee
12 ("RGPC"), Mr. Giuliani's principal campaign committee for the 2008 Presidential election, in
13 connection with the rate The Times charged for a full-page advertisement. The complaint alleges
14 that RGPC paid \$64,575 for its advertisement, far below The Times' typical charge of either
15 \$167,000 or \$181,692 for full-page advertisements. The complaint concludes that this discount
16 constitutes a corporate contribution from The Times to RGPC in violation of 2 U.S.C. § 441b.

17 Based on available information discussed below, including information provided by The
18 Times, the Commission has determined that there is no reason to believe The Times violated the
19 Federal Election Campaign Act of 1971, as amended, ("the Act") in this matter.

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 **A. Background**

22 On Thursday, September 13, 2007, RGPC contacted The Times, asking to run a full-page
23 advertisement the next day at a price of \$64,575, the same price as another political committee,
24 MoveOn.org Political Action ("MOPA"), reportedly paid for a full-page advertisement published

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1 in the Times on September 10, 2007.¹ The Times informed RGPC that it could not guarantee
2 that the advertisement would run the next day. Rudy Giuliani announced this process on a radio
3 show. See <http://hughhewitt.townhall.com/talkradio/transcripts/page.6>. RGPC paid \$64,575 to
4 The Times through its media vendor, and on Friday, September 14, The Times published the
5 RGPC advertisement, headed "'The willing suspension of disbelief.' – Hillary Clinton, 9/11/07."
6 The advertisement contained a disclaimer, "Paid for by the Rudy Giuliani Presidential
7 Committee, Inc. www.JoinRudy2008.com."

8 Later, on September 23, 2007, The Times published an article by Clark Hoyt, The Times'
9 Public Editor,² in which he stated that MOPA should not have been charged the "standby" rate of
10 \$64,575. Clark Hoyt, *Betraying Its Own Best Interests*, THE NEW YORK TIMES, September 23,
11 2007. Hoyt described this rate as available to advertisers who are not guaranteed what day their
12 advertisement will appear, only that it will be in The Times within seven days. According to
13 Hoyt, because The Times agreed to run MOPA's advertisement on a specific day, Monday,
14 September 10, 2007, The Times should have charged MOPA a higher rate of \$142,083. Hoyt
15 quoted Catherine Mathis, vice president of corporate communications for The Times, as
16 acknowledging "[w]e made a mistake," in that The Times' advertising representative failed to
17 make it clear to MOPA that for the \$64,575 rate, The Times could not guarantee the Monday,
18 September 10 placement; the representative, however, left MOPA with the understanding that the

¹ MOPA's advertisement, titled "General Petraeus Or General Betray Us? Cooking the books for the White House," criticized General David Petraeus on the day of his report to Congress regarding the status of the United States military operations in Iraq. Allegations that MOPA did not pay the appropriate Times rate are the subject of MUR 5939.

² Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

advertisement would in fact run that day.³ On the same day as the Hoyt article appeared in The Times, MOPA announced that it would pay \$142,083 for its advertisement, and the committee did so the following day, September 24, 2007.

Also on September 24, 2007, the complaint regarding the RGPC advertisement was filed with the Commission. The complaint, citing to the situation regarding MOPA as support, argues that the Times' policy required RGPC to pay the fixed-date rate, and therefore improperly received the "standby" rate for its advertisement because RGPC requested that its advertisement run on a date certain, Friday, September 14, 2007, and the advertisement in fact ran on that date. According to the complaint, RGPC should have paid the same higher rate of \$142,083 that MOPA reportedly paid.

B. Analysis

The Act prohibits corporations such as The Times from making contributions in connection with Federal elections,⁴ and prohibits political committees such as RGPC from knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term "contribution" includes giving "anything of value" for the purpose of influencing any election for Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term "anything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

³ Previously, The Times had reportedly defended its arrangement with MOPA regarding the cost of the advertisement. See, e.g., Emily Cadet, *MoveOn Ad Flap Likely to Be Replicated – On Both Sides – Through 2008*, CQ POLITICS.COM, September 19, 2007.

⁴ The Times is a corporation organized under the laws of the State of New York.

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1 The provision of goods or services at less than the usual and normal charge for such
2 goods or services is a contribution.⁵ *Id.* The Commission's regulations include "advertising
3 services" as an example of such goods and services. *Id.* If goods or services are provided at less
4 than the usual and normal charge, the amount of the in-kind contribution is the difference
5 between the usual and normal charge for the goods or services at the time of the contribution and
6 the amount charged the political committee. *Id.* For the purposes of this provision, "usual and
7 normal charge" for goods means the price of those goods in the market from which they
8 ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

9 The issue of vendor discounts to political committees has been addressed by the
10 Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a
11 vendor to provide a discount to a political committee so long as the discount is made available in
12 the ordinary course of business and on the same terms and conditions to other customers that are
13 not political committees or organizations. *See, e.g.*, AOs 2006-1 (PAC for a Change); 1995-46
14 (D'Amato); 1994-10 (Franklin National Bank).

15 Accordingly, this matter turns on whether the price paid for RGPC's advertisement fell
16 below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R.
17 § 100.52(d). The available information indicates that the appropriate charge turns on the
18 understanding between The Times and RGPC regarding the placement of the advertisement. A
19 large difference in price depends on whether the parties agreed that the advertisement would run

⁵ A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

1 on a certain date, an "open" arrangement, or whether the advertisement was not guaranteed to run
2 on a particular day but would run at some point during the next week, a "standby" arrangement.

3 The Times asserts in its response that the RGPC advertisement was clearly and
4 consistently treated as a "standby" advertisement and was properly billed at the published
5 standby rate of \$64,575. The Times resp. at 1. The Times distinguishes the RGPC
6 advertisement from the MOPA advertisement, claiming that the former was "discussed, accepted
7 and coded as a standby ad" and that the "RGPC was told and understood that, as a standby ad, it
8 might not run on the desired date" of September 14, 2007. *Id.*

9 According to The Times, when the RGPC submitted its advertisement to The Times, the
10 advertising salesperson wrote "standby" on it and sent it to the standby team in The Times'
11 advertising department. The Times resp. at 3. Consistent with The Times' usual procedures for
12 a standby advertisement, the advertising salesperson indicated that the RGPC desired the
13 advertisement to run on Friday, September 14, 2007, and the employees in the advertising
14 production department said that they would do the best they could. *Id.* The Times asserts that no
15 guarantees were ever made to RGPC that the advertisement would run on Friday, September 14,
16 and, indeed, it was not until late in the afternoon on Thursday, September 13, when The Times'
17 pagination requirements for Friday's paper became known, that The Times determined that the
18 advertisement would run on Friday as RGPC desired. *Id.* The Times asserts that all of this is
19 totally routine and in line with The Times' standard procedures for standby advertisements. *Id.*
20 at 3-4.

21 The weight of the available information cuts against a finding of reason to believe in this
22 matter. In response to the general allegation in the complaint that RGPC should pay the same

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1 higher rate as MOPA, The Times provided a specific account of an arrangement emphasized as
2 standby. Further, a standby arrangement by its very nature leaves open the possibility of the
3 advertisement running on the first of several possible dates, as occurred here. In addition,
4 RGPC's payment of \$64,575 on September 14, 2007, appears to have been timely.⁶

5 In sum, based on the available information, it does not appear that The Times made a
6 corporate contribution in the form of reduced advertising costs. Accordingly, the Commission
7 finds no reason to believe that The New York Times Company violated 2 U.S.C. § 441b(a) in
8 this matter.

⁶ On its 2007 October Quarterly Report, RGPC disclosed a \$64,600 payment to Crossroads Media LLC on September 14, 2007 for "media," presumably corresponding to its advertisement that day in The Times. This payment before the publication of the advertisement appears to be consistent with The Times' credit and payment terms, which state in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **MUR 5942**

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7 **Respondents:** Rudy Giuliani Presidential Committee, Inc. and John H. Gross,
8 in his official capacity as treasurer
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12 ("The Times") made a corporate contribution to the Rudy Giuliani Presidential Committee, Inc.
13 ("RGPC"), Mr. Giuliani's principal campaign committee for the 2008 Presidential election, in
14 connection with the rate The Times charged for a full-page advertisement. The complaint alleges
15 that RGPC accepted a prohibited in-kind corporate contribution when RGPC paid \$64,575 for its
16 full-page advertisement in The Times, far below the appropriate rate of \$142,083.

17 Based on available information discussed below, including information provided by
18 RGPC, the Commission has determined that there is no reason to believe RGPC violated the
19 Federal Election Campaign Act of 1971, as amended, ("the Act") in this matter.

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2 show. See [http://hughhewitt.townhall.com/talkradio/transcripts/page 6](http://hughhewitt.townhall.com/talkradio/transcripts/page%206). RGPC paid \$64,575 to
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17 September 10 placement; the representative, however, left MOPA with the understanding that the
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⁴ A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

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5 Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a
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7 the ordinary course of business and on the same terms and conditions to other customers that are
8 not political committees or organizations. *See, e.g.,* AOs 2006-1 (PAC for a Change); 1995-46
9 (D’Amato); 1994-10 (Franklin National Bank).

10 Accordingly, this matter turns on whether the price paid for RGPC’s advertisement fell
11 below The Times’ usual and normal charge for that kind of advertisement. *See* 11 C.F.R.
12 § 100.52(d). The available information indicates that the appropriate charge turns on the
13 understanding between The Times and RGPC regarding the placement of the advertisement. A
14 large difference in price depends on whether the parties agreed that the advertisement would run
15 on a certain date, an “open” arrangement, or whether the advertisement was not guaranteed to run
16 on a particular day but would run at some point during the next week, a “standby” arrangement.

17 RGPC in its response asserts that it paid the appropriate \$64,575 standby rate for its
18 advertisement that had no guarantee of being run on any particular day. RGPC resp. at 1. RGPC
19 provides a sworn affidavit from Patricia W. Heck, president of Crossroads Media LLC, who is
20 “responsible for overseeing all media placements for the Rudy Giuliani Presidential Committee,
21 Inc.” and has “specific knowledge of the actions undertaken by RGPC with respect to the

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advertisement at issue.” *Id.* at Exh. B, Heck Aff. at ¶ 1. Ms. Heck avers that she requested the \$64,575 standby rate for RGPC’s advertisement to run on September 14, 2007, even telling The Times’ advertising representative that RGPC did not want to run the advertisement unless it would run on September 14. *Id.* at ¶¶ 2, 4. The Times’ advertising representative, however, informed Heck that The Times could not guarantee that date. *Id.* at ¶¶ 3, 6.

RGPC distinguishes the circumstances of its advertisement from those of MOPA’s, asserting that while the latter’s had to run on Monday, September 10, 2007, the day of General Petraeus’ scheduled testimony before Congress, RGPC’s own advertisement had no such constraint: the events it referred to had already taken place and it spoke generally about General Petraeus’ qualifications and thus the advertisement could have run on any day of the seven-day standby window and would have remained meaningful. RGPC resp. at 2-3.

The weight of the available information cuts against a finding of reason to believe in this matter. In response to the general allegation in the complaint that RGPC should pay the same higher rate as MOPA, RGPC provided a specific account of an arrangement emphasized as standby. Further, a standby arrangement by its very nature leaves open the possibility of the

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1 advertisement running on the first of several possible dates, as occurred here. In addition,
2 RGPC's payment of \$64,575 on September 14, 2007, appears to have been timely.⁵
3 In sum, based on the available information, it does not appear that RGPC knowingly
4 received a corporate contribution in the form of reduced advertising costs. Accordingly, the
5 Commission finds no reason to believe that Rudy Giuliani Presidential Committee, Inc. and John
6 H. Gross, in his official capacity as treasurer, violated 2 U.S.C. § 441b(a).
7

⁵ On its 2007 October Quarterly Report, RGPC disclosed a \$64,600 payment to Crossroads Media LLC on September 14, 2007 for "media," presumably corresponding to its advertisement that day in The Times. RGPC's media vendor avers that RGPC cut a check for the advertisement and sent it via FedEx on September 13, 2007. RGPC resp. at Exh. B, Heck Aff. at ¶ 8. This payment before the publication of the advertisement appears to be consistent with The Times' "Credit and Payment Terms," which state in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

<http://www.nytimes.whites.net/mediakit>.

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